



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

ELP
Docket No. 250-99
17 December 1999

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of Title 10, United States Code, Section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 8 December 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion furnished by the Chief of Naval Personnel (Pers-834D), dated 30 July 1999, a copy of which is enclosed.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The military personnel record provided for the Board's review was incomplete. However, the Board found that you were appointed an ensign (O-1) in the Navy on 15 June 1985 and were designated a naval aviator on 19 December 1986. You were promoted to lieutenant (O-3) in June 1989.

The record reflects that served without incident until 27 April 1992 when you received nonjudicial punishment (NJP) for violations of Articles 92 and 134 of the Uniform Code of Military Justice (UCMJ). However, neither a copy of the NJP nor the punitive letter of reprimand that was awarded are filed in your record.

You provide a copy of an unqualified letter of resignation you apparently submitted on 15 November 1991 in which you

acknowledged that if it was accepted, you would receive an honorable discharge. In the only enclosure to the letter, you stated that you resigned in order to seek employment in the private sector. This letter is not filed in your record.

Contained in your record is a qualified letter of resignation dated 15 May 1992. That letter states "I submit this resignation in lieu of administrative processing. I have been informed and understand that if this resignation is accepted, I will subsequently receive a certificate of honorable discharge from the naval service. I desire detachment in June 1992." The letter is unsigned but the enclosure (1) to that letter which is identical to the one of 15 November 1991, is signed by you. The commanding officer (CO) endorsed the 15 May 1992 letter and recommended approval, stating that you had experienced sufficient punishment including the interruption of normal flight duties, mental anguish and possible irreparable damage to family integrity due to a lengthy judicial process.

On 4 June 1992, the Chief of Naval Personnel (CHNAVPERS) forwarded the 15 May 1991 letter to the Secretary of the Navy. CHNAVPERS noted that on 25 November 1991 the Naval Investigative Service (NIS) completed an investigation into allegations of misconduct. Your CO had advised CHNAVPERS in May 1992 that you had received NJP of a letter of reprimand for failure to obey a lawful written order and two specifications of adultery and wrongful solicitation. You had a sexual relationship with a woman that was not your wife and allowed her to reside with you in bachelor quarters without registering her as a guest. CHNAVPERS recommended that your resignation be approved and you be separated by reason of misconduct due to commission of a serious offense. The Assistant Secretary of the Navy (ASN) approved the recommendation and your resignation on 9 June 1992. The date the command was notified of the ASN's action is not shown in the record.

The record reflects that on 10 July 1992 you were honorably released from active duty and transferred to the Naval Reserve. The reason for discharge shown on your DD Form 214 was "completion of required active service."

Incident to your release from active duty, you received an adverse fitness report for the period 1 February to 10 July 1992. The reporting senior stated that you had been awarded a punitive letter of reprimand at NJP on 27 April 1992 for violation of Articles 92 and 134, UCMJ. It appears that this fitness report was not given to you at the time of your separation or sent to your forwarding address. On 18 September 1992, the fitness report section in the Bureau of Naval Personnel (BUPERS) (Pers-323) returned the foregoing report to you at your former command in order that you could comment on it before it became a per-

manent part of your record. The accompanying letter stated that if you did not respond within 30 days, the fitness report would be filed in the record. Whether an attempt was made to forward this report to you could not be determined. However, the report has been permanently filed in your record.

On 14 January 1994, the Reserve Officer Promotions and Appointment Branch in BUPERS advised the Correspondence Analysis Section (Pers-324C2) that during a screening of records to determine the eligibility of certain officers for promotion by a reserve selection board, it was noted that the DD Form 214 in your record was erroneous because you should have been discharged rather than released from active duty, and the reason for separation should have been misconduct due to commission of a serious offense. It was requested that your DD Form 214 be corrected. On 14 March 1994, Pers-324C2 issued a DD Form 215 (Correction to DD Form 214) showing that you resigned by reason of misconduct due to commission of a serious offense. The DD Form 215 showed the same forwarding address that was shown on the DD Form 214, which was also the address shown in your record as your parent's address.

Regulations provide that an unqualified resignation is one for which the only characterization of service allowed is honorable. A qualified resignation is one which the least favorable characterization of service allowed is a general discharge, but an honorable discharge may be authorized. Such a resignation is often initiated in lieu of separation processing for cause.

Regulations also provide that each officer has a responsibility for ensuring the continuity of his own fitness report record. A fitness report containing adverse matter must be referred to the officer for a statement. The signature of the officer does not imply acceptance of the report but merely acknowledges that the officer has seen the report and is aware of his right to submit a statement. If the officer does not submit a statement for inclusion with the report, he may still submit a statement at a later date and, upon acceptance, the statement will be filed in the microfiche record. Regulations also provide that an officer who was unable to obtain a copy a Regular fitness report after reasonable effort could submit a letter to BUPERS (now Naval Personnel Command (Pers-311)) explaining why he was unable to obtain the missing report.

The Board noted your contentions to the effect that as the result of BUPERS correcting the reason for discharge on your DD Form 214 from "completion of required active service" to "misconduct-commission of a serious offense", your employment with Federal Express (FEDEX) was terminated. You state that you were hired based on the information shown on your DD Form 214 but when the company reviewed your record and found the DD Form 215, you lost your job. You also contend that you are currently in an

employment dispute over information contained on the DD Form 215, which you never received. You point out that the letter of resignation on file says that you submitted your resignation "in lieu of administrative processing." You assert that this was not your resignation letter. You claim you submitted an unqualified and not a qualified resignation. You question why the November 1991 resignation is not filed in the record, but the resignation of 15 May 1992 is filed. You point out that your signature is missing from the qualified resignation on file, and that it appears that enclosure (1) of the earlier resignation, which contains your signature, was substituted for the second page of the 15 May 1992 resignation. You also assert that the adverse fitness report submitted at the time of separation was filed in the record in violation of regulations since it was never referred or forwarded to you for comment. While you admit to receiving NJP, you claim you were never given any punishment or ever received the letter of reprimand. You admit to being found in violation of the UCMJ article for adultery, but assert that you were not guilty of any crime and did not commit a serious offense. You also contend that you were told by the CO that the NJP would not have a negative effect on you, it would be set aside either upon detachment or after one year, and he did not want to take any action against you but had to investigate accusations by your former wife. You request that your record and DD Form 214 be corrected to show a more favorable narrative reason for discharge.

The Board noted that the separation processing documentation filed in your record was incomplete. However, the Board was not convinced that you did not submit a qualified letter of resignation or that the command would submit such a resignation without your signature. While you provide evidence that you did submit an unqualified resignation letter in November 1991, the Board noted that it was submitted four days prior to completion of the NIS investigation into the allegations of misconduct brought against you. At that time, you most likely had been advised of your rights and the nature of the allegations being investigated. It appeared to the Board that your unqualified resignation letter either was not forwarded or acted upon since the NIS investigation indicated that NJP was appropriate.

The Board substantially concurred with the comments in the advisory opinion to the effect that an unqualified resignation would not have been accepted following an NJP that awarded a letter of reprimand for illicit sexual behavior. Despite your contentions to the contrary, failure to obey a lawful written order and adultery are serious offenses and if referred to a court-martial could result in a punitive discharge. Therefore, had you not submitted a qualified letter of resignation, you would most likely have been referred for separation processing and could have received a general or a discharge under other than

honorable conditions. The Board was not persuaded that the missing signature page to the qualified resignation letter proves that you did not submit such a letter. Your contentions regarding the NJP being set aside are neither supported by the evidence of record nor by any evidence submitted in support of your application.

The Board concluded that BUPERS was within its authority to administratively correct the erroneous narrative reason on your DD Form 214 to reflect that you were discharged for misconduct as directed by ASN. Your contention that you never received the DD Form 215 prior to employment with FEDEX cannot be confirmed since there is way to determine if the DD Form 215 was ever mailed because BUPERS maintains its case files for only two years.

Finally, your contention with regard to the fitness report is correct. However, as an officer you share part of the responsibility for ensuring the continuity of your fitness report record. You provide no evidence that you made any effort to obtain a copy of your separation fitness report from your command. You should have been aware that a fitness report would be submitted and should have inquired about it prior to detachment, or made arrangements to ensure it was forwarded to you after discharge. Additionally, if you now wish to submit a statement, you may do so.

The Board concluded that the reason for discharge as now shown on the DD Form 214 is proper and no change is warranted. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director